118-655

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. 1065.

CAROLINE J. WHITNEY, EDWARD B. EATON, ARTHUR H. WHITNEY AND EDWARD R. EAGER, EXECUTORS OF LEONARD WHITNEY, DECEASED, PLAINTIFFS IN ERROR,

vs

PETER BUTLER, RECEIVER OF THE PACIFIC NATIONAL BANK OF BOSTON.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

FILED OCTOBER 4, 1886.

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JUDD & DETWEILER, PRINTERS, WASHINGTON.

1 UNITED STATES OF AMERICA, *ss:*

[Seal of the Circuit Court, Massachusetts.]

The President of the United States to the honorable the judges of the circuit court of the United States for the district of Massachusetts, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said circuit court before you, between Peter Butler, of Boston, in the State of Massachusetts, duly appointed and qualified as receiver of the Pacific National Bank of Boston in place of Linus M. Price, plaintiff, and Caroline J. Whitney, of Watertown; Edward B. Eaton and Arthur H. Whitney, both of said Watertown; and Edward R. Eager, of Canton, all in the said State, executors of the will of Leonard Whitney, deceased, late of said Watertown, defendants, in an action of contract, a manifest error hath happened, to the great damage of the said defendants, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done herein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the sixteenth day of September, in the year of our Lord one thousand eight hundred and eighty-six.

ALEX. H. TROWBRIDGE,
Deputy Clerk of the Circuit Court of the United States,
District of Massachusetts.

Allowed by—
LE BARON B. COLT,
U. S. Circuit Judge.

2 Circuit Court of the United States, District of Massachusetts, *ss:*

And now here, the judges of the circuit court of the United States in and for the district of Massachusetts make return of this writ by annexing hereto and sending herewith, under the seal of the said circuit court, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the Supreme Court of the United States, as within commanded.

In testimony whereof I, John G. Stetson, clerk of said circuit court of the United States in and for the district of Massachusetts, have hereto set my hand and the seal of said court this second day of October, A. D. 1886.

[Seal of the Circuit Court, Massachusetts.]

JOHN G. STETSON, *Clerk.*

3 UNITED STATES OF AMERICA, }
Massachusetts District, } *ss:*

At a circuit court of the United States for the first circuit, begun and holden at Boston, within and for the district of Massachusetts, on Saturday, the fifteenth day of May, in the year of our Lord one thousand eight hundred and eighty-six, before the Honorable Le Baron B. Colt, circuit judge.

PETER BUTLER, of Boston, in the District of Massachusetts, duly qualified and appointed Receiver of the Pacific National Bank of Boston in place of Linus M. Price, Plaintiff,

v.

CAROLINE J. WHITNEY, of Watertown, EDWARD B. Eaton and Arthur H. Whitney, both of said Watertown, and Edward R. Eager, of Canton, in said District, as they are Executors of the Will of Leonard Whitney, Deceased, late of said Watertown, Defendants. } No. 2117 A.

In an action of contract.

4 *Plaintiff's Declaration. Filed with Plaintiff's Writ.*

Circuit Court of the United States, District of Massachusetts.

LINUS M. PRICE, Receiver,

vs.

CAROLINE J. WHITNEY *et al.*, Ex'rs of Leonard Whitney.

Plaintiff says that the Pacific National Bank of Boston, heretofore and prior to the acts herein mentioned, was duly organized and authorized to do business as a national bank or banking association, under and by virtue of an act of Congress entitled "An act to provide a national currency, secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof," approved on the 3d day of June, A. D. 1864, and which said provisions are embraced in title sixty-two of the Revised Statutes of the United States, located and having its banking-house at Boston, in State of Massachusetts; that said banking association thereupon proceeded, and for a long time thereafter continued to issue currency and receive deposits of money, discount negotiable paper, and generally to transact the business of a national banking association, as authorized by the aforesaid act of Congress; that in its said business as aforesaid the said banking association contracted, prior to the 22d day of May, A. D. 1882, large debts and liabilities, and that, to wit, on the 22d day of May, A. D. 1882, the Comptroller of the Currency of the United States was satisfied, from a report of proceedings of the board of directors of the Pacific National Bank of Boston, previously made to said comptroller, that said banking association, the Pacific National Bank of Boston aforesaid, was insolvent and unable to pay its debts and liabilities; that the said Comptroller of the Currency, upon being satisfied of the insolvency of said banking association, as aforesaid, did, to wit, on the 22d day of May, A. D.

1882, and as authorized and empowered to do by virtue of section one of an act of Congress entitled "An act authorizing the appointment of receivers of national banks, and for other purposes," approved on the 30th day of June, A. D. 1876, duly appoint the said Linus M. Price receiver of all the property, books, records, and assets of the said banking association, as is provided by law; and the said Linus M. Price accepted said appointment, and duly qualified as such receiver aforesaid, and executed such bond and with such surety as required by the laws of the United States, and approved by said comptroller, and which said appointment more fully appears by a copy thereof hereto annexed, marked "Schedule A," or to the original of which, ready to be produced in court, the said plaintiff craves leave to refer; that thereupon the said plaintiff, under the direction of the said comptroller, took possession of the books, records, property, and assets of every description of the Pacific National Bank of Boston aforesaid, and has ever since been and is now engaged in collecting and converting the assets thereof and discharging in other respects the lawful duties of his said receivership.

And the plaintiff avers that the property and assets of said banking association are insufficient to pay and satisfy its debts and liabilities contracted as aforesaid, and that, in order to provide for the paying of the same, it became and was and is now necessary to enforce the personal liabilities of the stockholders, as is provided and imposed by said act of Congress.

And the said plaintiff further avers that the said Comptroller of the Currency did ascertain and determine, upon data satisfactory to him, that the assets and credits of said association were insufficient to pay its said debts and liabilities, and that, in order to provide the money necessary to pay said debts and liabilities of said association, it was necessary to enforce the individual liability of the shareholders of said association, as provided by the aforesaid act of Congress, and especially by the twelfth section thereof (section 5151 U. S. Rev. Statutes); and that said comptroller, in pursuance of the powers for that purpose vested in him by the aforesaid act of Congress, and to that end did, to wit, on the 27th day of November, A. D. 1882, order and make an assessment upon the said shareholders of said association, including the said defendant in this action, and each and every one of them, equally and ratably, to the amount of one hundred dollars per centum ($100 per cent.) of the par value of the shares of the capital stock in the said association held or owned by them respectively, including the defendant, at the time of its insolvency, failure, or suspension, as aforesaid, which said assessment more fully appears by a copy of the order making the same, hereto annexed, marked "Schedule B," or to the original thereof, ready in court to be produced, and to which the said plaintiff craves leave to refer.

And the said plaintiff further avers that the said comptroller has decided that it is now necessary to institute a suit or suits against the said shareholders, including the defendants, to enforce their said personal liability, and to that end has ordered and directed the said plaintiff to institute in the proper court or courts such suit or suits as may be necessary to enforce against each and every shareholder

of the said association, equally and ratably, his or her personal liability as such shareholder, in manner and to the extent provided by the twelfth section of said act (section 5151 U. S. Rev. Statutes), that is to say, the rate of one hundred per cent. hereinbefore specified.

And the said plaintiff further avers that the said defendants, as such executors of said estate, were, at the time of said insolvency, failure, or suspension of said banking association, *a* shareholder- of its capital stock to the amount of one hundred shares, of the par value of one hundred dollars per share, and of the aggregate value at par of ten thousand dollars, and held, or was entitled to hold, in their possession or control, the usual stock certificates, as such shareholders in said banking association, and that, to wit, on the first day of December, A. D. 1882, the said plaintiff made demand in writing upon the said defendant- as such shareholder- for payment of the sum of ten thousand dollars, the amount of said assessment so made as aforesaid under and by virtue of the order of the Comptroller of the Currency, hereto annexed and marked "Schedule B," as aforesaid.

And the said plaintiff avers that by reason of the premises the said defendants have become and now are indebted and liable to pay to the plaintiff, as such receiver, one hundred per cent. of the amount of said capital stock—that is, one hundred dollars upon each and every share so held and owned by the said defendants at the time of the declared insolvency, failure, and suspension of said banking association, as aforesaid, and which said liability or indebtedness of the defendants amounts, in the whole, to the sum of ten thousand dollars, which said sum of money so due, owing, and payable to the said plaintiff as receiver aforesaid, though often requested, the said defendants have not paid the same, nor any part thereof, but have wholly neglected and refused, and still do neglect and refuse, so to do, to the damage of the said plaintiff [of] — dollars, to recover which, with just costs, the said plaintiff brings suit.

Plaintiff says said Leonard Whitney, at time of his decease, was the owner and holder of said one hundred shares of stock, and the defendants were duly appointed the executors of said Leonard's will and are now acting as such, and as such owe plaintiff said sum, with interest, which is demanded, to the damage of the said plaintiff, as he says, the sum of twenty thousand dollars.

SCHEDULE A. Referred to in foregoing declaration.

WASHINGTON, *May* 22, 1882.

Whereas it appears from the report of proceedings of the board of directors of the Pacific National Bank of Boston, located in the city of Boston, county of Suffolk, and State of Massachusetts, at a meeting held on May 20, 1882, that the said bank is insolvent, and being satisfied that the said bank is insolvent and unable to pay its just and legal debts:

Now, therefore, I, John Jay Knox, Comptroller of the Currency, in pursuance of the power and authority vested in me by law, and under the provisions of sect. 1 of an act of Congress entitled "An act

authorizing the appointment of receivers of national banks, and for other purposes," approved June 30, 1876, do hereby appoint Linus M. Price receiver of the Pacific National Bank of Boston, with all the powers, duties, and responsibilities given to or imposed upon a receiver, under provisions of the Revised Statutes of the United States which authorize the appointment of a receiver.

In witness whereof I have hereto subscribed my name and caused my seal of office to be affixed to these presents, at the city of Washington, in the District of Columbia, this twenty-second day of May, A. D. 1882.

[L. s.] (Signed) JOHN JAY KNOX,
Comptroller of the Currency.

SCHEDULE B. Referred to in foregoing declaration.

In the Matter of "THE PACIFIC NATIONAL BANK OF BOSTON," Massachusetts.

To all whom it may concern:

This is to certify that I have taken an accounting of the condition of the estate of the Pacific National Bank of Boston, Massachusetts, aforesaid, and of its assets and liabilities, and I do find and determine, upon data satisfactory to me, that, in order to provide the money necessary to pay the debts of said association, it is necessary now to enforce to the extent hereinafter mentioned the individual liability of the shareholders of said association provided for by the twelfth section of the act of Congress entitled "An act to provide a national currency," approved June 3, 1864, and by sect. 5151 of the Revised Statutes of the United States, approved June 22, 1874, and to that end, and in pursuance of the powers vested in me by the said acts, I have made and hereby order and make an assessment or requisition upon the shareholders of said association or bank, and each and every one of them, equally and ratably, to the amount of one hundred per centum of the par value of the shares of the capital stock in the said association held or owned by them respectively at the time of its failure or suspension, and I direct Linus M. Price, receiver heretofore appointed of the said association, to take the necessary proceedings, by suit or otherwise, to enforce to that extent the said individual liability of the said shareholders.

In witness whereof I have hereto set my hand and caused my seal of office to be affixed to these presents, at the city of Washington, in the District of Columbia, this twenty-seventh day of November, A. D. 1882.

[L. s.] (Signed) JOHN JAY KNOX,
Comptroller of the Currency.

6 The writ in this cause is dated the fourteenth day of March, A. D. 1883, and was duly entered at the May term of this court, A. D. 1883, when and where the parties appeared by their respective attorneys.

To the plaintiff's writ and declaration the defendants filed the following answer:

Answer.

And now come the said defendants, and, for answer to the said plaintiff's writ and declaration, deny each and every allegation therein contained.

And, in addition to such general denial, the defendants further deny that at the time of said alleged insolvency, failure, or suspension of said National Banking Association, and of said alleged decision and order of the Comptroller of the Currency, they, the said defendants, were shareholders in said banking association, or held or were entitled to hold any certificate or certificates of any shares of its capital stock.

By their attorney, WM. SULLIVAN.

This cause was thence continued from term to term to the October term, A. D. 1885, when, on the twenty-seventh day of October, A. D. 1885, the following agreed facts were filed:

7 *Agreed Facts.* (*Filed Oct.* 27, 1885.)

MEMORANDUM.—These agreed facts appearing in the defendants' exceptions filed as of July 30, 1886, are here omitted in this transcript of record.

JOHN G. STETSON, *Clerk.*

On the same day the following agreement was filed:

Waiver of Trial by Jury. (*Filed October* 27, 1886.)

It has been agreed to by the parties to said action, and the said parties do hereby waive a trial by jury, and consent that the case may be heard and tried by the court without a jury.

RANNEY & CLARK,
Attorneys for Plaintiff.
E. R. HOAR,
WILLIAM SULLIVAN,
Attorneys for Defendants.

8 *Amendment of Agreed Statement of Facts.*

On the first day of January, A. D. 1886, the following amendment of agreed statement of facts was filed:

Amendment of Agreed Statement of Facts. (*Filed January* 1, 1886.)

MEMORANDUM:—This amendment of agreed statement of facts appearing in defendants' exceptions, filed as of July 30, 1886, are here omitted in this transcript of record.

JOHN G. STETSON, *Clerk.*

9 This cause thereupon came on to be heard by the court and was argued by counsel.

On the eleventh day of May, A. D. 1886, the following motion was filed:

Motion by Peter Butler. (*Filed May* 11, 1886.)

Peter Butler, of Boston, in the district of Massachusetts, represents that he has been duly appointed and qualified as receiver of the Pacific National Bank in place of Linus M. Price, removed. He therefore asks to be admitted as a party plaintiff in said action and for leave to prosecute the same in substitution for said Price.

By his attorneys, RANNEY & CLARK.

Which motion was allowed by the court.

This cause was thence continued under advisement to this present May term, A. D. 1886, when, on the thirtieth day of July, A. D. 1886, the opinion of the court is announced.

10 *Judgment.* (*July* 30, 1886.)

It is thereupon, to wit, July 30, 1886, considered by the court that the said Peter Butler, plaintiff, receiver, recover of the said Caroline J. Whitney, Edward B. Eaton, Arthur H. Whitney, and Edward R. Eager, executors, defendants, the sum of twelve thousand two hundred and five dollars, damages, and his costs of suit, taxed at ——.

The following bill of exceptions is allowed by the court and by direction of the court is filed as of July 30, A. D. 1886, before entry of judgment herein, and made part of the record in said cause:

Defendants' Exceptions. (*Filed as of July* 30, 1886.)

This was an action of contract brought by the receiver of the Pacific National Bank to recover an assessment of one hundred per centum on the par value of one hundred shares of the capital stock of said bank, of which the defendants, as said executors, are alleged to have been the owners at the time of the failure of said bank and the appointment of said receiver. The pleadings are made part of these exceptions. The case was heard without a jury by a single justice on the following agreed facts and amendment of agreed statement of facts:

11 *Agreed Facts.* (*Filed Oct.* 27, 1885.)

Leonard Whitney, defendants' testator, died July 5, 1881. At the time of his death he was the owner of one hundred shares of the capital stock of the Pacific National Bank, and then and for a long time prior thereto held a certificate therefor in due form, being registered as owner on the official register or stock-ledger of said bank.

One Abner Coburn, of the State of Maine, wanted to buy two hundred and fifty shares of the stock of the Pacific National Bank, and had made a special deposit in the bank of $25,000 as funds which were designed to be used and applied for that purpose, as shown by the letter of Abner I. Benyon, president of the said bank, to said Coburn, with the endorsement thereon, hereto annexed,

marked "Exhibit D." Said Benyon undertook to buy the stock desired for said Coburn. On Nov. 8, 1881, the defendants, as executors of said Leonard Whitney, placed the certificates of said stock of said deceased in the hands of R. L. Day & Co., brokers and auctioneers, and requested them to sell the same. On Nov. 12, 1881, said last-named stock was sold at public aution by said R. L. Day & Co. for the sum of $10,400, to one George R. Eager, of Boston, he bidding off the same at said auction sale and paying said auctioneers therefor on the 15th of said November by check on said bank, which was duly paid.

12 On the 16th of said November said auctioneers, after deducting their commissions, paid the balance, amounting to $10,375, to said executors. Upon the sale of said stock as aforesaid, said auctioneers delivered to said Eager the certificates therefor, with a power of attorney for the transfer of said stock, executed in blank so far as the date and name of the attorney are concerned, and a certificate from the probate court of the appointment of the defendants as executors as aforesaid, which said three papers are hereto annexed in the original, marked "Exhibits A," "B," and "C," respectively. Leonard Whitney and Leonard Whitney, Jr., are the same persons referred to in said certificates of stock. They are in the same condition now as when delivered. The said shares were never transferred on the books of said bank, and stand to-day in the name of said Leonard Whitney, except as hereinafter stated.

As a matter of fact, said Eager bought said stock at the request of said Benyon. He had an account with the bank as a depositor. To put him in funds with which to pay for said stock said Benyon had put to the credit of said Eager the exact amount of money required for the said purchase from the funds of the bank. It was posted and entered in the deposit account of the said Eager, and was drawn out by the said check of said Eager as aforesaid. In the books of the bank the money so furnished was carried to the credit of the said Eager as in the temporary loan. The deposit ticket was marked "P. T.," which stands for paying teller, and was made out by said A. I. Benyon. The said Eager delivered to said Benyon the said papers marked "A," "B," and "C," he holding the same as purporting to be security for, or as representing said loan, awaiting the filling of the order of said Coburn, with the design then to have the stock ordered transferred to him as soon as the said order had been filled. He had got fifty more shares of stock for the purpose of filling the said order of Coburn. This all occurred before the bank suspended, on Nov. 18, 1881. On that date the bank was taken charge of by Daniel Needham, a bank examiner of national banks.

The bank resumed business again March 18, 1882, and continued in the business of banking (by the permission of the Comptroller of the Currency, it being supposed to have been put into a solvent condition) until May 20, 1882, when it failed, and its assets were

13 put into the hands of the plaintiff as receiver, to be wound up, as alleged in the declaration in that behalf. Said Coburn did not take the stock purchased for him, and the matter remained as it was down to the appointment of the receiver as aforesaid. The

receiver found the said papers A, B, and C in an envelope purporting to represent a security for a demand loan to said Benyon. A copy of all writings on said envelope is hereto annexed marked "Exhibit E," and the original may be referred to by either party. The amount furnished to Eager as aforesaid with which to purchase said stock stood in the bank as part of the demand or temporary loan, said papers standing as security for the same.

After the bank suspended, on Nov. 18, 1881, as aforesaid, the directors passed the following votes, and an endeavor was made in vain under said votes to get said Coburn to take the stock purchased for him. These are copies of said votes. At a meeting of the directors held Jan. 26, 1882, the following:

"The matter relative to stock purporting to belong to Gov. Coburn was brought up by Mr. Sewall, as to whether said stock should be paid for out of the amount on deposit here, $25,000, or should the $25,000 be transferred to the credit of Col. Alden in part payment of his assessment.

"Voted, that Messrs. Sewall and Fallon be appointed a committee to proceed to Augusta, Me., to consult with Gov. Coburn in relation to the above matter, with full power to arrange it as may be for the best interest of the bank."

Under date of Feb. 6, 1882, at a meeting of the directors is the following:

"The meeting listened to the report of the committee sent east to confer with Gov. Coburn in regard to stock bought by Mr. Benyon for him, and after hearing the report, on motion of Mr. Fallon, it was voted to invite Gov. Coburn to leave the matter to referees, the bank to choose one, Gov. Coburn one, and in case they cannot agree, they to choose a third; the vote of either two to be binding, and asking that the meeting be in Boston."

Under date of Feb. 11, 1882, at a meeting of the directors, is the following:

"After a full discussion of the matter connected with the claim made by Gov. Coburn, it was voted to leave it in the hands of
14 Mr. Coleman and Mr. Sewall, of the board, and Mr. R. Stone, Jr., attorney, they to have full power to arrange and settle as in their judgment they shall think best."

The defendants did not know by whom said stock was bought or bid off at said auction sale, unless the knowledge of the auctioneers was their knowledge. They and the auctioneers had no knowledge or information as to the stock being bought for said Coburn through said Benyon or the bank. The defendants had no reason to believe that said bank was insolvent, or about to become so, when the stock was sold as aforesaid by them, but believed and had reason to believe the contrary thereof. After delivering said papers A, B, and C, and getting their money, neither said defendants nor said auctioneers took any steps to inquire and ascertain whether the stock was transferred on the books of the bank, or the blanks in said power of attorney had been filled. They had no knowledge or information as to how or for what purpose the said papers or stock were held by said Benyon, or the bank, or said Eager, until after the appointment of the

receiver as aforesaid. They believed, and had no reason to doubt, that the purchaser had the stock transferred on the books of the bank in due form. Said defendants took no steps to see and ascertain the fact of the delivery of said papers A, B, and C, and took no steps towards getting the purchase-money; but they had, prior to said sale, instructed said auctioneers to deliver said papers to the party purchasing said stock, and they received said purchase-money in due course, on Nov. 16, four days after said sale, as above set forth.

The provisions in the articles of association and by-laws of said bank relating to the transfer of shares of stock are as follows:

Transfers of Stock.

SECT. 14. The stock of this bank shall be assignable only on the books of the bank, subject to the restrictions and provisions of the act, and a transfer book shall be kept in which all assignments and transfers of stock shall be made.

SECT. 15. Certificates of stock, signed by the president and cashier, may be issued to stockholders, and the certificates shall state upon the face thereof that the stock is transferable only upon the books of the bank, and when stock is transferred the certificates thereof shall be returned and cancelled and new certificates issued.

15 The organization of said bank and its having done business before its failure, the failure of the same, and the appointment of a receiver, and its assets going into the hands of the plaintiff as receiver, the laying and order of assessment and for its collection by the Comptroller of the Currency, the notice and demand of the same from the defendants and their refusal to pay, are all admitted as alleged and set forth in said declaration and the copies of the certificate annexed thereto.

RANNEY & CLARK,
Attorneys for the Plaintiff.
E. R. HOAR,
WM. SULLIVAN,
For Defendants.

EXHIBIT A.

Know all men by these presents that, for value received, we, the executors of the estate of Leonard Whitney, of Watertown, do hereby make, constitute, and appoint, irrevocably, —— —— true and lawful attorney (with power of substitution), for and in our name and on our behalf, to sell, assign, and transfer unto —— —— one hundred (100) shares now standing in the name of estate of L. Whitney, of Watertown, Mass., in the capital or joint stock of the Pacific National Bank, and said attorney is hereby fully empowered to make and pass all necessary acts for the said assignment and transfer.

Witness our hands and seals.

EDW. B. EATON, [SEAL.]
C. I. WHITNEY, [SEAL.]
A. H. WHITNEY, [SEAL.]
EDW. R. EAGER, [SEAL.]
Executors Estate L. Whitney.

Signed, sealed, and delivered in presence of—
N. G. TORREY.
H. A. PHILBROOK, (Y. H. W.)
E. B. EATON, (C. I. W.)
E. B. EATON, (E. R. E.)

16 For value received, I appoint, irrevocably, —— —— as my substitute, with all the powers above given to me.
Witness — hand and seal — —— ——, 187–.
—— ——. [SEAL.]

Signed, sealed, and delivered in presence of—
—— ——.

EXHIBIT B.

[SEAL.] Commonwealth of Massachusetts.

Probate Court.

MIDDLESEX, *ss.:*

I, Joseph H. Tyler, register of the probate court for said county of Middlesex, hereby certify that at a probate court holden in and for the said county on the sixth day of September, in the year of our Lord one thousand eight hundred and eighty-one, the last will and testament of Leonard Whitney, late of Watertown, in said county, deceased, testate, was duly proved and allowed, and letters testamentary thereon issued to Caroline I. Whitney, Edward B. Eaton, Arthur H. Whitney, of said Watertown, and Edward R. Eager, of Canton, in the county of Norfolk, the executors therein named, who gave bond to the acceptance of the judge of said court for the due performance of said trust according to law.

I also certify that it appears by the records and files of said court that said letters are now in full force.

In witness whereof I have hereunto set my hand and the seal of said court this ninth day of November, in the year of our Lord one thousand eight hundred and eighty-one.

JOSEPH H. TYLER, *Register.*

EXHIBIT C.

No. 7. 50 shares.

The Pacific National Bank of Boston, Massachusetts.

This certifies that Leonard Whitney, Jr., is proprietor of fifty shares in the capital stock of the Pacific National Bank of
17 Boston, Mass. Transferable only on the books of the said bank, in person or by attorney, on surrender of this certificate.
Boston, Nov. 1st, 1877.

A. I. BENYON, *President.*
F. J. CHICK, *Cashier.*

No. 444. 50 shares.

The Pacific National Bank of Boston, Massachusetts.

This certifies that Leonard Whitney is proprietor of fifty shares in the capital stock of the Pacific National Bank of Boston, Mass. Transferable only on the books of the said bank, in person or by attorney, on surrender of this certificate.

Boston, January 1, 1880.

A. I. BENYON, *President.*
F. J. CHICK, *Cashier.*

EXHIBIT D.

BOSTON, *Sept.* 21, 1881.

Hon. Abner Coburn, Skowhegan, Me.

DEAR SIR: Yours of 20th rec'd with c'k, $25,000, which we will use pending the purchase of our stock, and will hold on your ac. as a special deposit, securities to the same amount, till we succeed in making the purchase. This leaves the amount in your control until invested, and, I trust, will be satisfactory to you. One of our insurance Cos. was in the market yesterday for $50,000 of the stock and picked up a few lots.

Yours truly, A. I. BENYON, *Pr.*

(Indorsed:) Pay to D. Alden or Abner Coburn.

18 EXHIBIT E.

On an envelope enclosing papers A, B, and C, referred to in agreed facts, was this:

"On demand. No. 549 (in red ink).

A. I. Benyon.

Coll.

100 shares Pacific Bank stock, for which he paid $10,400 to estate of L. Whitney, and which was intended for Ex-Gov. Coburn.

10,400."

(In pencil:) "Charge to A. I. Benyon, by order of directors."

19 *Amendment of Agreed Statement of Facts.*

The agreed statement of facts in said case is amended and changed as follows, viz:

George R. Eager bought the stock at auction at the request of Mr. Benyon, and at a price fixed by the latter, said Eager telling him that he could buy it for less. Mr. Eager first gave to R. L. Day & Co. his own check on the Pacific National Bank for the amount of the purchase. They found that the Eagle National Bank, in which they deposited, would not take the same in their deposit account, and thereupon went with it to the office of said Eager. He being absent, his clerk went and saw Mr. Benyon about it; whereupon Mr. Benyon took the check of Mr. Eager and gave a cashier's check

of the Pacific Bank on the Eliot Bank for the amount, and upon receipt of that (which was paid) R. L. Day & Co. delivered to Mr. Benyon the certificates of stock and the other accompanying papers named in said agreement. In the deposit account of said Eager in the said Pacific Bank, and in his pass-book, the amount of the check of said Eager is entered as paid. This, the defendants claim, was only book-keeping, and represented no actual transaction, and that the check of Mr. Eager being sent back to Mr. Benyon with the other papers was entered against his account and a fictitious debit entered to balance the credit of the deposit made in his behalf, as stated in the agreed statement. The amount of the money carried to the credit of the said Eager remained on the books of the bank as a temporary or demand loan to the time of the final failure, the books not showing to whom the loan was made.

RANNEY & CLARK,
For Plaintiff.
WM. SULLIVAN,
For Defendants.

20 The defendants asked the court for the following rulings:

1. That the books of the bank other than the transfer-book showed that said stock had been transferred to the bank, either as owner or pledgee, and was held by said bank as owner or pledgee at the time of said failure or suspension.

2. That the books of said bank other than the transfer-book showed that the defendants had parted with their interest in said stock, and were not at the time of said failure or suspension shareholders of said stock.

3. That the purchase of said stock from the defendants was made at the request of its president by an agent employed for and on behalf of said bank with funds furnished by said bank; that it then became the duty of said bank to record said transfer in accordance with its by-laws, and that the failure of the bank to make said transfer will be corrected by this court if it appears that no creditor was injured by the failure properly to record said transfer.

4. That at the time of the failure or suspension of said bank said stock was held by said bank as owner or pledgee.

5. That the defendants are not liable in this action.

These requests for rulings the court refused.

The court found, among other facts, that the shares of stock were never transferred on the books of the bank, but stood in the name of Leonard Whitney, the defendants' testator, when the bank
21 passed into the hands of the receiver; that the bank was not the purchaser and never intended to buy this stock; that it was purchased, in fact, for Gov. Coburn; that by loaning Eager the money and subsequently debiting his account with the check it is manifest that Mr. Benyon was not purchasing the stock for the bank, but intended, through Eager, to fill Coburn's order, and that the defendants are liable.

The defendants, having duly excepted to the refusals and findings aforesaid, and being aggrieved thereby, presented these exceptions

and prayed that the same may be allowed, which is accordingly done and made a part of the record.

LE BARON B. COLT,
U. S. Circuit Judge.

A true record.
Attest: JOHN G. STETSON, *Clerk.*

22 The following is the opinion of the court in accordance with which judgment was entered for the plaintiff.

Opinion of the Court. (*July* 30, 1886.)

Circuit Court of the United States, District of Massachusetts.

PETER BUTLER, Receiver,
v.
CAROLINE J. WHITNEY *et al.*, Executors. } No. 2117 (A), Law Docket.

COLT, *J.:*

Under the agreed statement of facts we think the defendants must be held liable for the assessment. The shares of stock were never transferred on the books of the bank, but stood in the name of Leonard Whitney, the defendants' testator, when the bank passed into the hands of the receiver. The defendants on November 12, 1881, sold the stock through a broker to one George R. Eager, and received payment for the same. The bank suspended November 18, 1881. It resumed business again March 18, 1882, and continued until May 20, 1882, when it failed and a receiver was appointed. It was the duty of the defendants to have seen that the stock was transferred on the books of the bank. The by-laws provide that the stock shall be assignable only on the books of the bank, and that the certificates of stock shall state upon the face thereof that the
23 stock is transferable only upon the books of the bank, and when transferred the certificates shall be returned and cancelled. Eager bought this stock at the request of Benyon, president of the bank. Benyon had received $25,000 from Gov. Coburn, of Maine, for investment in the stock of the bank, and the one hundred shares sold by the defendants was intended to go to make up a part of this purchase. Eager, in payment for the stock, gave a check on the Pacific Bank, and Benyon had put to the credit of Eager, who was a depositor, from the funds of the bank the exact amount required for the purchase of the stock. The money so furnished was carried to the credit of Eager as a temporary loan. Upon the filling of the whole order of Coburn the design was then to have the stock transferred to him. Fifty shares more of stock were afterwards purchased towards filling Coburn's order. It further appears that the check on the Pacific Bank, which Eager gave to the broker, would not be received as a deposit by the Eagle Bank, where the broker kept his account, whereupon Eager's clerk took the check to Benyon, who gave a cashier's check of the Pacific Bank on the Eliot Bank for the amount, which was paid. Upon receipt of the cashier's check the broker delivered to Benyon the two certificates of stock of

fifty shares each, received from defendants a power of attorney, in which the name of the attorney and date were left blank, and a certificate of the probate court of the appointment of defendants as executors. In the deposit account of Eager in the bank the check which he gave is entered as paid. The amount of money carried to the credit of Eager by Benyon to meet the check remained on the books of the bank as a temporary loan to the time of final failure.

Upon this state of facts it is contended by the defendants that the purchase was really made for the bank with funds furnished directly by the bank, and that it then became the duty of the bank to have the legal transfer made, and that
24 this court has power to correct the record, and treat that which ought to have been done as already done; and further, that a national bank can acquire a good title to its own stock, either as owner or pledgee, notwithstanding the prohibition of the statute, and that neither the bank itself, nor any party except the Government can set up the illegality of the purchase or pledge to escape any liability consequent on such ownership. Johnston *v.* Laflin, 103 U. S., 800; National Bank of Xenia *v.* Stewart, 107 U. S., 676. But, upon the proof before us, we cannot assent to the proposition that the bank was the purchaser, and, therefore, the reasoning of defendants' counsel is not applicable to this case. The bank never intended to buy this stock. It was purchased, in fact, for Gov. Coburn, and he had sent $25,000 to the bank for this purpose, which the bank was to hold on special deposit until the order was filled, when the whole stock was to be transferred to him. Under these circumstances it would seem immaterial whether the stock in question was paid for by Eager's check, or by the cashier's check given by Benyon. By loaning Eager the money, and subsequently debiting his account with the check, it is manifest that Benyon was not purchasing the stock for the bank, but intended through Eager to fill Coburn's order.

This being a suit brought by the receiver, who represents the creditors, and it appearing that the stock was not transferred on the books of the company, as provided by the by-laws, we think the defendants liable, and that judgment must be entered for plaintiff. Davis *v.* Society of Essex, 44 Conn., 582. Adderly *v.* Storm, 6 Hill, 624; Anderson *v.* Philadelphia Warehouse Co., 111 U. S., 479, 483; Johnston *v.* Laflin, 103 U. S., 800, 804; Turnbull *v.* Payson, 95 U. S., 518; Brown *v.* Adams, 5 Biss., 181.

25 *Assignment of Errors and Prayer for Reversal.* (*Filed September* 18, 1886.)

Circuit Court of the United States, District of Massachusetts.

PETER BUTLER, Receiver,
v.
CAROLINE J. WHITNEY *et al.*, Executors. } No. 2117 A.

The defendants, by their attorney, come and say that in the records and proceedings in said action there is manifest error, in this, to wit:

1. That the court refused to rule that the books of the bank, other

than the transfer book, showed that said stock had been transferred to the bank, either as owner or pledgee, and was held by said bank, as owner or pledgee, at the time of said failure or suspension.

2. That the court refused to rule that the books of said bank, other than the transfer book, showed that the defendants had parted with their interest in said stock, and were not, at the time of said failure or suspension, shareholders of said stock.

3. That the court refused to rule that the purchase of said stock from the defendants was made at the request of its president, by an agent employed for and on behalf of said bank, with funds
26 furnished by said bank; that it then became the duty of said bank to record said transfer in accordance with its by-laws, and that the failure of the bank to make said transfer will be corrected by this court, if it appears that no creditor was injured by the failure properly to record said transfer.

4. That the court refused to rule that at the time of the failure or suspension of said bank said stock was held by said bank as owner or pledgee.

5. That the court refused to rule that the defendants are not liable in this action.

6. That the court found that the shares of stock were never transferred on the books of the bank, but stood in the name of Leonard Whitney, the defendants' testator, when the bank passed into the hands of the receiver.

7. That the court found that the bank was not the purchaser and never intended to buy this stock, and that it was purchased in fact for Gov. Coburn.

8. That the court found that by loaning Eager the money and subsequently debiting his account with the check Benyon was not purchasing the stock for the bank, but intended through Eager to fill Coburn's order.

9. That the court found that the defendants are liable.

10. That the judgment was given for the said plaintiff against the said defendants, whereas said judgment ought to have been given for said defendants.

And the said defendants pray that the said judgment aforesaid may be reversed, and that they be restored to their rights.

By their attorney, WM. SULLIVAN.

27 UNITED STATES OF AMERICA, } ss:
Massachusetts District, }

I, John G. Stetson, clerk of the circuit court of the United States for the first circuit and district of Massachusetts, certify that the foregoing is a true copy of the record of said circuit court in the cause entitled Peter Butler, receiver of the Pacific National Bank of Boston, plaintiff, *v.* Caroline J. Whitney *et al.*, executors, defendants, No. 2117 A, lately determined in said circuit court, and of all the proceedings therein, and of the opinion of the court, and of the assignment of errors, and prayer for reversal therein.

In testimony whereof I hereunto set my hand and affix the seal of said circuit court, at Boston, in said district, this seventh day of Sep-

tember, in the year of our Lord one thousand eight hundred and eighty-six, and of the Independence of the United States the one hundred and eleventh.

[Seal of the Circuit Court, Massachusetts.]

JOHN G. STETSON, *Clerk.*

28 (*Bond on Writ of Error.*)

Know all men by these presents that we, Caroline J. Whitney, Edward B. Eaton, Arthur H. Whitney, and Edward R. Eager, as we are executors of the will of Leonard Whitney, Jr., late of Watertown, in the district of Massachusetts, deceased estate, as principals, and Edward B. Eaton and Edward R. Eager, individually, as sureties, are held and firmly bound unto Peter Butler, as he is receiver of the Pacific National Bank of Boston, in the full and just sum of thirteen thousand dollars, to be paid to the said Peter Butler, as he is receiver as aforesaid, his certain attorney, successors, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated the fourteenth day of September, in the year of our Lord one thousand eight hundred and eighty-six.

Whereas lately at a circuit court of the United States, in the district of Massachusetts, in a suit depending in said court between said Peter Butler, as he is receiver as aforesaid, and successor of Linus M. Price, a former receiver of said bank, by whom said suit was begun, and the said executors, judgment was rendered against the said executors, and the said executors having procured a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Peter Butler, as he is receiver as aforesaid, citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next:

Now, the condition of the above obligation is such that if the said executors shall prosecute their said writ of error to effect and answer all damages and costs if they fail to make their plea good, then the above obligation to be null and void; otherwise to remain in full force and virtue.

CAROLINE J. WHITNEY, [L. S.]
EDW. B. EATON, [L. S.]
A. H. WHITNEY, [L. S.]
EDW. R. EAGER, [L. S.]
Executors.
EDW. B. EATON. [L. S.]
EDW. R. EAGER. [L. S.]

Signed, sealed, and delivered in presence of—
OAKES AMES.

Approved:
LE BARON B. COLT,
U. S. Circuit Judge.

A true copy of the bond taken by the judge at the time of allowing the writ of error named in said bond, which bond is on file in the office of the clerk of the circuit court of the United States for the first circuit and district of Massachusetts.

Attest: JOHN G. STETSON,
Clerk U. S. C. C., Mass. Dist.

29 *Citation.*

The United States of America to Peter Butler, of Boston, in the district of Massachusetts, receiver of the Pacific National Bank of Boston, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States within and for the district of Massachusetts, wherein Caroline J. Whitney, of Watertown, Edward B. Eaton, and Arthur H. Whitney, both of said Watertown, and Edward R. Eager, of Canton, all in said district, executors of the will of Leonard Whitney, deceased, late of said Watertown, are plaintiffs in error and you are defendant in error, to show cause, if any there be, why [the] judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Le Baron B. Colt, circuit judge of the United States for the first judicial circuit, this seventeenth day of September, in the year of our Lord one thousand eight hundred and eighty-six.

LE BARON B. COLT,
U. S. Circuit Judge, First Judicial Circuit.

Service has been duly made and is hereby acknowledged.
A. A. RANNEY,
Att'y for Peter Butler, Receiver.

Endorsed on cover: [Stamped:] Supreme Court U. S. Received Oct. 4, 1886. Clerk's office. Massachusetts C. C. U. S. No. 1065. Caroline J. Whitney, Edward B. Eaton, Arthur H. Whitney, & Edward R. Eager, executors of Leonard Whitney, dec'd, plaintiffs in error, *vs.* Peter Butler, receiver of the Pacific National Bank of Boston. Filed October 4, 1886.

118-655

United States Supreme Court.

CAROLINE J. WHITNEY ET AL, EXECUTORS, IN ERROR,

v.

PETER BUTLER, RECEIVER.

The defendant in error applies and asks that the said case may be advanced and heard on October 12, 1886, with the other Pacific National Bank cases, assigned for that day, to wit: cases numbered from 789 to 793, and in support of the motion says: There is only one single question of law for argument, and the same is involved directly or indirectly in the other said cases. The question arises upon an agreed statement of facts and evidence on which the Court below found for the receiver, Leonard Whitney, the testator, owned at the time of his decease ~~two~~ hundred shares of stock. His executors sold the same in the market, and delivered the certificates with a power of attorney for its transfer executed in blank; but no transfer of the same had been made on the books of the bank, as required by the by-law and certificate when the bank passed into the hands of the receiver to be wound up. The question is whether the estate is liable for the assessment sued for to enforce the personal liability. The plaintiff in error contends that the bank

itself bought the stock in the sale, and held it either as owner or as collateral security, and that the estate is not liable. The reasons for the advancement and early argument of the case are, in most respects, like those urged in the other said cases.

By

A. A. RANNEY,

Attorney.

I, A. A. RANNEY, on oath, say that the facts set forth in the foregoing petition are true.

A. A. RANNEY.

Subscribed and sworn to before me,

I. R. CLARK,

Notary Public.

118-655

Supreme Court of the United States.

OCTOBER TERM, 1886.

CAROLINE J. WHITNEY ET AL., EXECUTORS,
vs.
PETER BUTLER, RECEIVER.
} In Error.

BRIEF OF PLAINTIFFS IN ERROR.

STATEMENT OF THE CASE.

Supreme Court of the United States.

OCTOBER TERM, 1886.

CAROLINE J. WHITNEY ET AL., EXECUTORS,
vs.
PETER BUTLER, RECEIVER.
} In Error.

BRIEF OF PLAINTIFFS IN ERROR.

STATEMENT OF THE CASE.

The testator of the plaintiffs in error at the time of his death was the owner of one hundred shares of the capital stock of the Pacific National Bank, holding certificates therefor and being registered as owner on the stock register of said bank. Before the suspension of said bank and before said plaintiffs had any reason to suppose that said bank was insolvent, they sold these one hundred shares, through brokers, at public auction on Nov. 12th, 1881, for $10,400.

Some time prior to this, one Abner Coburn, of the State of Maine (Gov. Coburn), desiring to purchase two hundred and fifty shares of said stock had made a special deposit in said bank of twenty-five thousand dollars to be used by said bank upon the terms and in the manner shown by the following letter of Abner I. Benyon, president of said bank. See Record page .

BOSTON, Sept. 21, 1881.

HON. ABNER COBURN,
Skowhegan, Me.:

Dear Sir: — Yours of 20th rec'd with c'k, $25,000, which we will use, pending the purchase of our stock, and will hold on your a/c, as a special deposit, securities to the same amount, till we succeed in making the purchase. This leaves the amount in your control until invested, and I trust will be satisfactory to you. One of our Insurance Co.'s was in the market yesterday for $50,000 of the stock, and picked up a few lots.

Yours truly,

A. I. BENYON,
Pr.

[*Indorsed:*] Pay to D. Alden or Abner Coburn.

Benyon, as president of the bank, undertook to buy the stock desired by Coburn, and for this purpose said Benyon employed one Geo. R. Eager as agent to purchase the plaintiffs' said one hundred shares at a price fixed by said Benyon, Eager telling him that he could purchase the stock for less, and said Eager bid off the stock at the auction.

To put Eager in funds with which to pay for said stock, said bank put to the credit of said Eager in his deposit account at said bank the exact amount of money required for said purchase, from the funds of the bank. In the books of the bank the money so furnished was carried to the credit of the said Eager. The deposit ticket was made out by Benyon, the president of the bank, and was marked "P. T.," which stands for "paying teller."

Eager gave his own check on said bank to the brokers for the amount of the purchase. The Eagle Bank, in which said brokers deposited, refused to take this check, and thereupon said president took the check of Eager and gave to the brokers a cashier's check of said Pacific Bank on the Eliot Bank for the amount of the purchase, and upon receipt of that (which was paid) said brokers delivered to the president of said bank the certificates of stock, power of attorney, and certificate of the appointment of plaintiffs as executors, copies of which, marked "Exhibits A, B and C," appear in the Record at page . These papers are in the same condition now as when delivered to said president.

In the deposit account of said Eager in said Pacific Bank the amount of the check of Eager is entered as paid. The amount of the money carried to the credit of the said Eager remained on the books of the bank as a temporary or demand loan down to the time of the final failure of said bank, the books of the bank not showing to whom the loan was made (see amendment to agreed facts, Record page).

All this happened prior to the suspension of said Pacific Bank on Nov. 18, 1881. Said Coburn did not take any stock purchased for him, and the said shares sold by the plaintiffs were never transferred on the stock register or transfer book, and stand thereon today in the name of Leonard Whitney.

The plaintiffs in error did not know by whom or for what purpose said stock was bought, nor did they know of any arrangement between said Coburn and Benyon or the bank. They believed at the time of the sale that the bank was solvent. They took no steps to ascertain whether the stock was transferred on the books of the bank, but believed and had no reason to doubt that said stock had been transferred in due form by the bank; the plaintiffs did not know till after the final fail-

ure of said bank that said stock had not been transferred in due form to the purchaser, whoever that purchaser was.

After the bank suspended on Nov. 18, 1881, the directors thereof passed the votes found in the Record at page and endeavored in vain to get Coburn to take the stock purchased of the plaintiffs.

The bank, after its suspension Nov. 18, 1881, resumed business on March 18, 1882, and continued in business until May 20, 1882, when it failed and its assets were put into the hands of a receiver. Said receiver found among the papers of said bank the papers marked A, B and C (Record page), in an envelope purporting to represent a security for a demand loan; a copy of all writings on said envelope appears in the Record at page .

The provisions in the articles of association and by-laws of said banking association relating to the transfer of shares of its stock appear in said Record at page .

The single question for the decision of this Court is, whether, on the agreed facts, the plaintiffs in error were, at the time of the failure, May 20, 1882, shareholders of said Pacific National Bank within the meaning of Section 5151 of the Revised Statutes of the United States so as to render them liable under said section to an assessment of one hundred per centum on the par value of said one hundred shares of stock.

Specification of Errors.

I. The refusal of the Court to make the following rulings requested by the plaintiffs in error:

1. That the books of the bank other than the transfer book showed that said stock had been transferred to the bank either as owner or pledgee and was held by said bank as owner or pledgee at the time of said failure or suspension.

2. That the books of the bank other than the transfer book showed that the defendants below had parted with their interest in said stock and were not at the time of said failure or suspension shareholders of said stock.

3. That the purchase of said stock from the defendants below was made at the request of its president by an agent employed for and on behalf of said bank, with funds furnished by said bank, that it then became the duty of said bank to record said transfer in accordance with its by-laws, and that the failure of the bank to make said transfer will be corrected by this court if it appears that no creditor was injured by the failure properly to record said transfer.

4. That at the time of the failure or suspension of said bank said stock was held by said bank as owner or pledgee.

5. That the defendants below were not liable in this action.

II. The following findings of the court:

1. That the shares of stock were never transferred on the books of the bank, but stood in the name of Leonard Whitney, defendant's testator, when the bank passed into the hands of the receiver.

2. That the bank was not the purchaser, and never intended to buy this stock, and that it was purchased, in fact, for Governor Coburn.

3. That by loaning Eager the money, and subsequently debiting his account with the check, Benyon was not purchasing the stock for the bank, but intended through Eager to fill Coburn's order.

4. That the defendants below are liable.

III. That the judgment was given for plaintiffs below against said defendants below, whereas said judgment ought to have been given for said defendants below.

Points and Authorities.

The facts in this case having been agreed upon, the errors assigned in the findings of the court are errors in law and are open to the plaintiffs in error in this court.

Binney *v.* Chesapeake and Ohio Canal Co., 8 Peters, 214.

A national bank can acquire a good title to its own stock, both as owner and as pledgee, notwithstanding the prohibition of the statute, and neither the bank itself, nor any party, except the Government, can set up the illegality of the purchase or pledge to escape any liability consequent on such ownership.

Johnson *v.* Laflin, 103 U. S., 800.
National Bank of Xenia *v.* Stewart, 107 U. S., 676.

The purchase of the stock from the plaintiffs in error was made by the bank with funds furnished directly by the bank. As between said plaintiffs and the bank the title passed to said bank on the delivery of the papers marked A, B, and C. It then became the duty of the bank, as assignee of said stock, to have the legal transfer made upon its books in accordance with its by-laws. A court of equity would compel the bank to make the transfer, and, as there is no contention that a creditor was injured by any

incompleteness in the record of transfer, this court has power to correct the record or to treat that which ought to have been done as already done.

Webster *v.* Upton, 91 U. S., 65, at p. 72.
Ward and Garfit's Case, L. R., 4 Eq., 189.
Gilbert's Case, L. R., 5 Ch., App., 558.

The provisions of the Rev. Sts. making said stock transferable on the books of the association (Rev. St., Sec. 5139) is directory merely, and the failure of the bank to keep its transfer book properly cannot make one a shareholder or prevent one from becoming a shareholder.

The Statute (Rev. Stat. U. S., Sec. 5139) provides that the stock shall be transferable on the books of the association in such manner as may be prescribed in the by-laws or articles of association. It is the bank's own by-laws (Record page) that provide for the keeping of a transfer-book and for the entry of all assignments therein. It is the duty of the bank to keep said transfer book and to enter all assignments therein. If the bank, knowing the intention of the plaintiffs in error to have said transfer properly made, failed to record said transfer, although having all papers necessary for making the same, it violated the duty imposed upon it by its own by-laws. It is submitted that the writings on the envelope in which the papers marked A, B, and C, were found by the receiver in the possession of the bank, the entries in the books of said bank, of the amount paid for said stock, and the votes of the directors of said bank (Record page) show a transfer of said stock from the plaintiffs in error to said bank within the meaning of Rev. Sts., Sec. 5139, and that the plaintiffs had no title or interest in the same after said transfer, for the fact whether the bank chose to hold said stock as owner or pledgee could not affect the plaintiffs, as they never pledged it to the bank or to any one else.

The defendants could do no more than request the bank to record the transfer on its transfer-book; but the certificates, with power of attorney, having come into possession of the bank, with full knowledge on the part of the bank of the nature of the sale and its own duty to record the transfer, the case stands as though the defendants had requested, and the bank had omitted, the recording of the transfer. National banks can put no restrictions on the transfer of stock, and it is submitted that the failure of the bank to keep a proper record of its transactions, and to observe its own by-laws, will not render the defendants liable.

E. R. HOAR,
Attorney for Plaintiffs in Error.

CAROLINE J. WHITNEY ET AL,
EXECUTORS,
PLAINTIFFS IN ERROR,

v.

PETER BUTLER, RECEIVER,
IN PLACE OF PRICE.

Argument for Defendant in Error.

118-655

Office Supreme Court U. S.
FILED
OCT 11 1886
JAMES H. MCKENNEY,
CLERK.

United States Supreme Court.

CAROLINE J. WHITNEY ET AL, EXECUTORS,

PLAINTIFFS IN ERROR,

v.

PETER BUTLER, RECEIVER, IN PLACE OF PRICE.

Argument for Defendant in Error.

The facts admitted, and that the Court below was justified in finding, are these:

The shares of stock were never transferred on the books of the bank, but stood in the name of Leonard Whitney, the defendant's testator, when the bank passed into the hands of the receiver. The defendants, on November 12, 1881, sold the stock through a broker to one George R. Eager, and received payment for the same. The bank suspended November 18, 1881. It resumed business again March 18, 1882, and continued until May 20, 1882, when it failed, and a receiver was appointed. It was the duty of the defendants to have seen that the stock was transferred on the books of the bank. The by-laws provide that the stock shall be assignable only on the books of the bank, and that the certificates of stock shall state upon the face thereof that the stock is transferable only upon the books of the bank, and when transferred the certificates shall be returned and cancelled. Eager bought this stock at the request of Benyon, president of the bank. Benyon had received $25,000 from Governor Coburn, of Maine, for investment in the stock of the bank, and the one hundred shares sold

by the defendants was intended to go to make up a part of this purchase. Eager, in payment for the stock, gave a check on the Pacific bank, and Benyon had put to the credit of Eager, who was a depositor, from the funds of the bank, the exact amount required for the purchase of the stock. The money so furnished was carried to the credit of Eager as a temporary loan. Upon the filling of the whole order of Coburn, the design was then to have the stock transferred to him. Fifty shares more of stock were afterwards purchased towards filling Coburn's order. It further appears that the check on the Pacific bank, which Eager gave to the broker, would not be received as a deposit by the Eagle bank, where the broker kept his account, whereupon Eager's clerk took the check to Benyon, who gave a cashier's check of the Pacific bank on the Eliot bank for the amount, which was paid. Upon receipt of the cashier's check the broker delivered to Benyon the two certificates of stock of fifty shares each, received from defendants a power of attorney in which the name of the attorney and date were left blank, and a certificate of the probate court of the appointment of defendants as executors. In the deposit account of Eager in the bank, the check which he gave is entered as paid. The amount of money carried to the credit of Eager by Benyon to meet the check, remained on the books of the bank as a temporary loan to the time of final failure.

The bank was not the purchaser, and never was intended to be. It was purchased in fact for Governor Coburn, and he had sent $25,000 to the bank for this purpose, which the bank was to hold on special deposit until the order was filled, when the whole stock was to be transferred to him. By loaning Eager the money, and subsequently depositing his account with the check, it is manifest that Benyon was not purchasing the stock for the bank, but intended through Eager to fill Coburn's order, and so that the bank might not appear even to be what it was not in fact, the purchaser.

The exceptions taken, and the errors assigned, seem rather to be that the Court erred in not finding, as a question of fact, that the bank was the purchaser of the stock as a basis of a claim in matter of law, that it then became the duty of the bank

to have the legal transfer made, and that the Court has the power and should correct the registry, or treat that as done which ought already to have been done, and that the bank could acquire a valid title to its stock, notwithstanding the prohibition of the statute, nobody but the government being able to set up that objection. (Johnson *v.* Laflin, 103 U. S. Gov.; Nat. Bank of Zenia *v.* Stewart, 107 U. S. 676.)

This Court cannot revise a ruling of the Court below in matter of fact. Where a jury trial was waived, the finding of the Court below thereon is conclusive, on writ of error, to the same effect as a verdict of a jury.

Supervisors *v.* Kinnicutt, 103 U. S., 554.
Annie Lindsley, 104 ib. 185.

The agreed statement of specific facts must be taken to be true and binding here.

The weight of the evidence agreed upon was for the Court to determine. So far only a special finding of facts would suffice to show the conclusions reached. As none such appears in the record, this Court will assume for the purpose of the law argument, the conclusion most favorable to the defendant in error, with all reasonable presumptions and inferences in his favor to sustain the judgment. Such conclusions are stated above, with the additional fact that the bank went on in business after the alleged sale, contracting debts, and the creditors relying on the registry of the stock, this being fairly implied from the facts agreed and the allegations of the declarations the truth of which is admitted.

The law seems to be too plain to be controverted, that Leonard Whitney, being the actual owner of the stock at the time of his decease, he and his estate, represented by the executors of his will, continued a stockholder, as to creditors and for the purposes of the suit at bar, until the stock had been transferred on the books in accordance with the by-laws, and as indicated in the certificates, however it might have been as between the parties to the transfer, or as to an attaching creditor.

Irons *v.* Man. Nat. Bk. The Reporter of July, 1886, 69, Blodgett, J.
Bowdell *v.* Nat. Bk., Brown's Nat. Bk., cases 146.
Davis *v.* Essex Bap. So., 44 Conn., Chipman, J.
Davis *v.* Stevens, Brown's Nat. Bk., cases 158.
Adderly *v.* Storm, 6 Hill, 624.
Anderson *v.* Phila. Warehouse Co., 111 U. S. 479, 483.
Turnbull *v.* Payson, 95 U. S. 418.
Brown *v.* Adams, 5 Biss., 181.
Morewetz on P. Corp., p. 170 *et seq.* and notes.

In Johnson *v.* Laflin, the Court say, by Field, J., "It (the transfer on the books) is necessary to protect the seller against subsequent liability as a stockholder, and perhaps also to protect the purchaser against proceedings of the seller's creditors. Purchasers and creditors, in the absence of other knowledge, are only bound to look to the books of registry of the bank."

This principle lies at the basis of all the numerous decisions, that a party who holds stock apparently of record as absolute owner, but in fact as collateral security for a debt of the transferer, is held liable for the purposes of the personal liability. In case of Bowdell *v.* Bank, Brown's Nat. Bk., cases 146, (Giles, J.) the pledgee had been paid the debt as security for which the stock was transferred in fact, and the certificate delivered back with power of Attorney, without the re-transfer being actually made on the books, and he was yet held liable. It was held to be the duty of the party to see the re-transfer so made. So it was the duty of the vendors here, as representing the testator, to see the transfer completed on the books, as this was essential before the testator's estate was divested of his and its liability to the creditors past and future.

A. A. RANNEY.